Proskauer

newsletter

September 2010
Vol. 9, No. 5

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By **Anthony J. Oncidi***

Court May Consider "Stray Remarks" In Determining Liability For Discrimination

Reid v. Google, Inc., 50 Cal. 4th 512 (2010)

Brian Reid worked as Google's director of operations and director of engineering for fewer than two years before he was terminated due to job elimination and poor performance. Reid, who was 52 years old at the time of his hire, reported to Wayne Rosing (age 55) and at times to Urs Hölzle (age 38), though he regularly interacted with other high-level employees of the company, including some who were in their late 20's. Reid alleged that Hölzle and other employees made derogatory age-related remarks to him, saying that his ideas were "obsolete" and "too old to matter," that he was "slow," "fuzzy," "sluggish," and "lethargic" and that he did not "display a sense of urgency." Other co-workers allegedly called Reid an "old man" and "old guy," an "old fuddy-duddy," told him his knowledge was "ancient" and joked that Reid's CD jewel case office placard should be an "LP" instead of a "CD." When Reid was informed no other positions were available for him at Google, he was told he was not a "cultural fit" at the company.

Although the trial court granted Google's motion for summary judgment, the Court of Appeal reversed, holding that Reid had raised a triable issue of material fact as to whether the stated reason for his termination was pretextual. The California Supreme Court affirmed the judgment of the Court of Appeal, holding that the ageist remarks were not irrelevant even though they were made by non-decisionmakers outside the context of the decisional process. In so ruling, the Supreme Court rejected the "stray remarks" doctrine's "categorical exclusion of evidence" and determined that the court of appeal was correct in considering such evidence and in reversing the summary judgment. The Supreme Court also decided that Google's evidentiary objections were preserved for appeal even though the trial court judge did not expressly rule on them. *Compare Reeves v. MV Transp., Inc.*, 186 Cal. App. 4th 666 (2010) (summary judgment properly granted to employer that rejected older applicant for staff attorney position who did not have clearly superior credentials).

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Male Victim Of Sexual Harassment By Female Co-Worker May Proceed With Lawsuit

EEOC v. Prospect Airport Servs., 2010 WL 3448119 (9th Cir. 2010)

Rudolpho Lamas and Sylvia Munoz were co-workers employed by Prospect Airport Services, Inc. at McCarran Airport in Las Vegas. Lamas, whose wife died in September 2001, began working at Prospect in the spring of 2002. During the fall of 2002, Munoz, who was married, began a series of rejected sexual overtures toward Lamas. Over the course of several months, Munoz handed Lamas three or four "flirtatious notes," stating that she was "turned on" by Lamas and that she wanted to "go out" with him. When Lamas informed their boss, Patrick O'Neill, about Munoz's overtures, O'Neill advised Lamas to tell Munoz the romantic interest was not mutual and to notify management if Munoz "kept it up" so they could "take care of it." Lamas followed O'Neill's advice and told Lamas he was not interested, but Munoz did not stop and in fact increased her romantic overtures toward him, handing him a revealing picture of herself while telling him about her "crazy dreams about us in the bathtub" and confirming to Lamas – lest there be any doubt – that "seriously, I do want you sexually and romantically!" Lamas complained to another manager who did nothing to stop Munoz's unwelcome advances, while yet another told Lamas he did not want to get involved in "personal matters." Lamas' co-workers made remarks to him suggesting he was gay. After four or five months of harassment and no protection from management, Lamas' performance began to deteriorate and eventually he was terminated for "complaints about [his] job performance and negative attitude."

The district court granted summary judgment to Prospect, but the Ninth Circuit reversed, holding that Lamas had established a genuine issue of fact as to whether Munoz's sexual conduct and comments were welcome – "Title VII is not a beauty contest, and even if Munoz looks like Marilyn Monroe, Lamas might not want to have sex with her for all sorts of possible reasons…Some men might think chivalry obligates a man to say yes, but the law does not." The court further determined there was sufficient evidence the harassment was severe or pervasive enough to alter the conditions of Lamas' employment and that Prospect's response was "inadequate," noting that the assistant general manager had advised Lamas to sing "I'm too sexy for my shirt" to himself in response to his complaints about Munoz. *See also Breiner v. Nevada Dep't of Corr.*, 610 F.3d 1202 (9th Cir. 2010) (male correctional officers could proceed with Title VII challenge to state's policy of hiring only female correctional lieutenants at a women's prison).

White Police Officer Was Not Terminated In Retaliation For Reporting Alleged Harassment Of Black Employee

Thompson v. City of Monrovia, 186 Cal. App. 4th 1860 (2010)

Officer Matthew Donald Thompson sued the Monrovia Police Department for harassment and a hostile work environment arising from offensive remarks and behavior that were allegedly directed at an African-American colleague. Thompson also alleged he suffered retaliation for having reported the racism. The trial court granted summary judgment to the police department, and the Court of Appeal affirmed, holding there was no material factual dispute as to whether the department had retaliated against him. Similarly, the court affirmed summary judgment of Thompson's claim of harassment on the grounds that he had failed to produce evidence that "*he* was subjected to harassing comments or conduct because of his association with or advocacy on behalf of African Americans," that the incidents about which Thompson had complained were neither severe nor pervasive enough to be actionable and because Thompson's racial harassment claim was barred by the statute of limitations. Finally, the court held the claim involving the department's alleged failure to investigate harassment and retaliation had to be dismissed because it was not the basis for a "stand-alone tort" and, in any event, there was uncontroverted evidence the department had conducted an appropriate investigation. *See also Henderson v. Pacific Gas & Elec. Co.*, 187 Cal. App. 4th 215 (2010) (plaintiff's counsel who failed to file timely opposition to summary judgment motion could not rely on Cal. Code Civ. Proc. § 473(b) for relief); *Murray v. Alaska Airlines, Inc.*, 2010 WL 3292968 (Cal. S. Ct. 2010) (federal agency's investigative findings concerning whistleblower complaint should be given collateral estoppel effect when a complainant elects not to invoke his right to challenge such findings but instead initiates a separate lawsuit).

Termination Of Disabled Employee Did Not Violate FEHA

Milan v. City of Holtville, 186 Cal. App. 4th 1028 (2010)

Tanya Milan, who worked as a water treatment operator for the City of Holtville, was injured on the job while moving a large piece of metal. After Milan applied for workers' compensation benefits, a physician who had been retained on behalf of the city, examined her and concluded she would not be able to return to work at the water treatment plant. Shortly thereafter, the city notified Milan that because she would be unable to return to work, it had decided to offer her rehabilitation benefits, which she accepted before taking an online real estate course. Milan continued to receive a regular paycheck from the city until she was notified 18 months after the injury had occurred that the city was terminating her employment. Milan filed this lawsuit against the city, alleging it had violated the Fair Employment and Housing Act by failing to determine whether it could provide effective accommodations for her disability. Following a bench trial, the lower court ruled in favor of Milan, holding the city had failed to engage in the

interactive process to find a possible accommodation of Milan's disability. However, the Court of Appeal reversed based on the absence of any evidence that Milan had ever requested an accommodation or that she had expressed to the city any desire to return to her former job. The court held that "where, as here, an employer has not received any communication from an employee over a lengthy period of time, and after the employee has been given notice of the employer's determination the employee is not fit [to return to work], an employer is not required [under FEHA]… to initiate a discussion of accommodations." *See also Brownfield v. City of Yakima*, 2010 WL 2902503 (9th Cir. 2010) (city's requirement that police officer undergo a fitness-for-duty examination following his exhibiting emotionally volatile behavior was required by business necessity and did not violate the Americans with Disabilities Act, the First Amendment or the Family Medical Leave Act); *EEOC v. UPS Supply Chain Solutions*, 2010 WL 3366256 (9th Cir. 2010) (UPS may have been obligated to provide deaf employee who had limited proficiency in written English with a sign language interpreter for certain meetings).

Male Pilots Terminated For Harassing Flight Attendant Were Not Victims Of Discrimination

Hawn v. Executive Jet Mgmt., Inc., 2010 WL 3218520 (9th Cir. 2010)

Gregory Hawn, Michael Prince and Aric Aldrich (all pilots) were terminated by Executive Jet Management after a female flight attendant, Robin McCrea, alleged they had sexually harassed her and created a hostile work environment involving an array of conduct including sexualized banter, crude jokes and the sharing of crude and/or pornographic emails and websites. Following their terminations, plaintiffs filed this lawsuit alleging discrimination on the basis of race, sex and national origin. Plaintiffs alleged that a group of female flight attendants (that included McCrea) also traded sexual emails and participated in sexual discussions but that the employer considered the pilots' terminations to be relatively "risk free" because the pilots were "young, white, American males." The district court granted the employer's motion for summary judgment, and the Ninth Circuit affirmed, holding that plaintiffs had failed to show that similarly-situated employees (the female flight attendants) had engaged in similar conduct but had received more favorable treatment by the employer. The Ninth Circuit affirmed summary judgment on one of the two grounds cited by the lower court – that the two groups were not similarly situated because the pilots' conduct gave rise to a complaint of sexual harassment, while the flight attendants' alleged conduct did not. (The Ninth Circuit rejected the district court's conclusion that the two groups were not similarly situated because they reported to different supervisors.) *See also Spencer v. World Vision, Inc.* 2010 WL 3293706 (9th Cir. 2010) (faith-based humanitarian organization is exempt from Title VII's prohibition against religious discrimination).

Employee Terminated For Violating Non-Compete Could Proceed With Lawsuit

Silguero v. Creteguard, Inc., 187 Cal. App. 4th 60 (2010)

Shortly after Creteguard hired Rosemary Silguero, her former employer (FST) contacted Creteguard and "requested the cooperation and participation of [Creteguard] in enforcing the confidentiality agreement [between Silguero and FST], including those provisions prohibiting Silguero from all sales activities for 18 months following Silguero's departure or termination from FST." In response to the letter from FST, Creteguard terminated Silguero's employment even though "we believe that non-compete clauses are not legally enforceable here in California." In her lawsuit against Creteguard, Silguero alleged the non-compete that Creteguard enforced violated Cal. Bus. & Prof. Code § 16600 and that her termination, therefore, violated the public policy of the State of California. The trial court sustained Creteguard's demurrer to the complaint, but the Court of Appeal reversed, holding that Creteguard's decision to honor an unenforceable non-compete violated the public policy of California as expressed in Section 16600.

Card Dealers Had No Standing To Challenge Mandatory Tip-Pooling Policy

Lu v. Hawaiian Gardens Casino, Inc., 2010 WL 3081272 (Cal. S. Ct. 2010)

Louie Hung Kwei Lu, a card dealer at Hawaiian Gardens Casino, filed this class action challenging the casino's tip-pooling policy that required dealers to set aside 15 to 20 percent of the tips they received, which the casino distributed to other employees who provided service to casino customers. The Supreme Court granted review in this case to determine the narrow issue of whether Cal. Lab. Code § 351 provides employees with a private right of action or whether, instead, the labor commissioner is charged with enforcing the statute. The Supreme Court held there is no private right of action under the statute but observed that a common law claim for conversion may be available to employees under appropriate circumstances. *See also Gutierrez v. California Commerce Club*, 2010 WL 2991875 (Cal. Ct. App. 2010) (dismissal of wage-and-hour class action on demurrer is reversed because it was "premature to make determinations pertaining to class suitability on demurrer").

Employer's Wage Statements Did Not Violate Labor Code

Morgan v. United Retail Inc., 186 Cal. App. 4th 1136 (2010)

Amber Morgan filed this class action lawsuit against her former employer under Cal. Lab. Code § 226, alleging United Retail had violated the law because the wage statements issued by the employer listed the total number of regular hours and overtime hours separately and did not provide the *sum* of the regular and overtime hours as a separate line item. During her deposition, Morgan testified

she was injured by United Retail's failure to include an additional line item showing the sum of hours worked because "[i]t makes it a little difficult to count how many hours I have been working." The trial court granted United Retail's motion for summary adjudication, and the Court of Appeal affirmed, holding that "United Retail's wage statements complied with section 226's requirements… by showing the actual number of regular hours worked and the actual number of overtime hours worked during the applicable pay period." *See also Nordstrom Commission Cases*, 186 Cal. App. 4th 576 (2010) (objections to settlement of class action involving payment of net sales commissions and PAGA claims were properly overruled); *Kirby v. Immoos Fire Protection, Inc.*, 186 Cal. App. 4th 1361 (2010) (employer may recover its attorney's fees for successful defense of claim for failure to provide rest periods as required under the wage orders); *cf. United States v. Hunter*, 2010 WL 3274397 (9th Cir. 2010) (former employee who committed mail fraud and various additional crimes while posing as a licensed nurse was required to provide restitution to former employers in the form of repayment of the salaries she received from them).

Freight Pick-Up Drivers May Have Been Employees And Not Independent Contractors

Narayan v. EGL, Inc., 2010 WL 3035487 (9th Cir. 2010)

Mohit Narayan and two other drivers for EGL (a global transportation, supply chain management and information services company headquartered in Texas) were California residents who provided services to EGL pursuant to independent contractor agreements that contained a Texas choice-of-law provision. Narayan and the other drivers filed a lawsuit against EGL in California alleging they were in fact employees of EGL who were deprived of overtime wages, reimbursement for business expenses, meal compensation, etc. EGL removed the case to federal court and obtained summary judgment after the district court applied Texas law and concluded plaintiffs were independent contractors and not employees. The district court also concluded the result would be the same under California law. On appeal, the Ninth Circuit reversed, holding that the lower court had erred in failing to apply the multi-faceted California test for determining whether an employment relationship existed between the drivers and EGL. *Compare Murray v. Principal Fin. Group, Inc.*, 2010 WL 2902512 (9th Cir. 2010) (insurance agents are independent contractors and not employees and thus may not sue for sex discrimination under Title VII); *Garcia v. W&W Cmty. Dev., Inc.*, 186 Cal. App. 4th 1038 (2010) (foster family agency is not vicariously liable for foster parent's conduct because the latter is an independent contractor and not an employee of the former); *United States v. Graf*, 610 F.3d 1148 (9th Cir. 2010) (independent consultant was a "functional employee" of company who did not hold a personal attorney-client privilege with respect to his communications with company's attorneys).

Employee's Ideas May Not Have Been The Property Of His Former Employer

Mattel, Inc. v. MGA Entm't, Inc., 2010 WL 2853761 (9th Cir. 2010)

In 2000, during his employment with Mattel, Carter Bryant pitched his idea for the Bratz line of dolls to MGA, which was one of Mattel's competitors. The year before, Bryant had signed an employment agreement with Mattel pursuant to which he agreed to disclose and assign to Mattel all "inventions" conceived or reduced to practice at any time during his employment with Mattel. After it learned of Bryant's involvement in the Bratz line of dolls, Mattel sued MGA, Bryant and others. Prior to the trial, which resulted in (among other things) a $10 million jury award to Mattel for copyright damages and the imposition of a constructive trust in favor of Mattel over all Bratz trademarks, the judge determined that under the employment agreement, Bryant had assigned his "ideas" (not just his "inventions") to Mattel. The Ninth Circuit vacated the constructive trust imposed by the district court after determining "the agreement could be interpreted to cover ideas, but the text doesn't compel that reading." The court further held the constructive trust had to be vacated even if the agreement covered ideas as well as inventions because "[i]t is not equitable to transfer this billion dollar brand – the value of which is overwhelmingly the result of MGA's legitimate efforts – because it may have started with two misappropriated names. The district court's imposition of a constructive trust forcing MGA to hand over its sweat equity was an abuse of discretion and must be vacated." Finally, the Ninth Circuit held the phrase "at any time during employment" to be ambiguous and held the district court erred in concluding the agreement clearly assigned to Mattel works made outside the scope of Bryant's employment.

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